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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JOHN L. LEA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES

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ARGUMENT

I.

REPLY TO THE GOVERNMENT ON THE FRAUD ISSUE

A.

While the Government states that tangible loss is not an essential element of mail fraud, nevertheless it argues pecuniary injury by asserting that Safeway was entitled to the monies allegedly received by petitioner[1] and that these payments inevitably increased Safeway's purchasing costs. These arguments do not demonstrate tangible monetary injury.

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1. Safeway policy provided that the company *may* require an accounting of gratuities received. Additionally, the company conflict of interest statement was signed on October 15, 1969 and covered the *preceding* five years. The mailings charged in the indictment all occurred in 1974 and 1975. (Petitioner's Brief and Appendix, pages 8 and 9, A13-20.)

With regard to Safeway's right to the sums allegedly paid petitioner by Petlin and Horwich, aside from the cases in the political corruption arena, the mail fraud statute has been construed as prohibiting schemes which seek to entice the victim of the fraud to transfer something of economic value to the defendant. *Miller* v. *United States* (Seventh Circuit, 1909), 174 F. 35, 39. Although the indictment identifies Safeway as the victim of a supposed scheme, neither the indictment nor the proof submitted at trial define any tangible commodity transferred by it to petitioner or any other individual identified as a participant in the fraud. With regard to the supplies purchased for Safeway, it has never been contended that as a consequence of any scheme Safeway did not receive exactly the supplies it needed at costs determined by the market. Petitioner's alleged enrichment came directly from Petlin and Horwich. Presumably, these individuals were neither deceived nor defrauded.[2]

The Government's second argument, that payments to a purchasing agent must cause higher costs to the purchaser, while neither alleged in the indictment or established at trial, does not take into consideration the prosecution's admission that petitioner always got the very best price he could for Safeway, that he never bought at higher prices, and that all commissions earned by Mutual, including commissions on sales to Safeway, were legitimate. (T. 537-560) The price and quality of the merchandise purchased by petitioner was always appropriate to *market* conditions and Safeway's needs. (T. 103, 282, 384, 425) He never bought at a higher price from Mutual.

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2. During closing arguments to the jury the prosecution stated, "We are not here, make no doubt about it, we are not here because he got a turkey at Thanksgiving. . . ." (T. 542) Petitioner allegedly received money from Petlin and Horwich. Could the Government argue that Safeway suffered tangible pecuniary injury and loss cognizable under the mail fraud statute if petitioner had allegedly received food or tickets to ball games, or been treated to elegant dining at fancy restaurants or golf or tennis at exclusive clubs?

(T. 111) When the price and quality of the product offered by Mutual was not appropriate, petitioner would not accept Mutual's offerings. (T. 238-239) On this record, it has never been demonstrated or contended that Safeway could have purchased its supplies at *less* than the prevailing cost established by the market. On this record, whether Safeway purchased its supplies through Mutual or others, its cost would be the same.[3]

B.

Petitioner has argued that the concept that a Section 1341 prosecution may be maintained in the context of a breach of duty and receipt of secret profits where loss has not been sustained and where injury has not been contemplated involves extension of doctrines evolved to prosecute public political

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3. In both *United States* v. *George* (Seventh Circuit, 1973) 477 F. 2d 508, cert. denied 414 U. S. 827 and *United States* v. *Hasenstab* (Second Circuit, 1978) 575 F. 2d 1035, cert. denied 439 U. S. 827, defendant made his agreement directly with the supplier. Additionally, in both cases defendants were paid pursuant to a percentage of sales. The price of the goods was not determined by market conditions and it was successfully argued that except for the agreement the company could have negotiated a lower price for the product it was buying, that is, arguably, the supplier would have accepted a price for goods equal to his net receipt after the money payment to the purchasing agent. On the nexus point, if the agreement provides for a percentage payment to the agent, the monies paid to the agent reflect his share on each transaction.

None of these elements are present in the instant case. The record is silent as to the authority of Mutual to set prices with its client suppliers. Petitioner was allegedly paid by the brokers out of the commissions they received. Safeway paid the suppliers directly. In view of the Government's admissions at trial, the price was determined by market conditions and not by the suppliers, Mutual or petitioner. Petitioner was never paid pursuant to any formula or percentage agreement.

figures under the mail fraud statute.[4] Petitioner argued that these precedents ought not to be extended into private relationships. The Government challenges this argument by asserting that the deprivation of an employer of the honest and faithful services of an employee and receipt by the employee of secret profits is sufficient to warrant conviction under the statute.[5]

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4. The comment by Mr. W. Robert Gray, "The Intangible—Rights Doctrine and Political—Corruption Prosecutions Under the Federal Mail Fraud Statute," scheduled to appear in 47 *U. Chi. L. Rev. ....., No. 3* (Spring 1980), questions the historical and precedential foundations of the development of this doctrine. As the scheduled publication date of this article is late August, 1980, it is reproduced as Appendix E. The article has not been fully edited or corrected and appears in the Brief in the form submitted by the editors.

5. The instant opinion also departs from other precedents. Prior to the decision in this litigation, the Seventh Circuit had mantained that neither breach of fiduciary duty nor receipt of secret profits were alone sufficient to constitute violation of the mail fraud statute. *United States* v. *Bush* (1975), 522 F. 2d 641, 648, cert. denied 424 U. S. 977; *George* cited supra in footnote 3 at page 512; see also *United States* v. *McNeive* (Eighth Circuit, 1976), 536 F. 2d 1245, 1251 footnote 12. To establish the offense, additionally required were material misrepresentations and active concealment. *Bush* at page 648. In each instance, with the exception of the political corruption cases decided in this Circuit, the victim of the fraud had suffered actual tangible pecuniary loss and injury.

To the extent the statute required breach of duty, profit at the expense of the victim, misrepresentation and concealment, each of the cases cited by the Appellate Court and the Government contained one or more of these elements. (Petitioner's Brief, page 15 footnote 2) Thus in *Ohrynowicz* v. *United States* (1976), 542 F. 2d 715, cert. denied 429 U. S. 1027, the mailed material contained false information. In *United States* v. *Louderman* (Ninth Circuit, 1978) 576 F. 2d 1383, cert. denied 439 U. S. 896, defendants acknowledged their active misrepresentation to secure confidential information. In *Abbott* v. *United States* (Fifth Circuit, 1956), 239 F. 2d 310, purloined maps and payment for this product was sent

(Footnote continued on next page.)

In private relationships more than mere breach of duty and receipt of secret profits is required to sustain conviction under the statute. In the instant case, pecuniary loss or the attempt to cause tangible harm to Safeway has not been demonstrated. None of the monies allegedly paid petitioner were sent in the mails. No misrepresentation or falsity was contained in any of the confirmations, brokerage statements or supplier checks. Where conduct neither contemplates nor causes any tangible loss or injury, federal criminal statutes ought not be applied to aid any business in the management of the loyalties of its employees.

II.

REPLY TO THE GOVERNMENT ON THE NEXUS ISSUE

In the original Brief, petitioner submitted that each transaction alleged in each count of the indictment, that is, each use of the mails, must be proximately connected to an element of the scheme defined by the Appellate Court. That Court specifically identified the fraud as follows:

1. Petitioner's disclosure of competitor offers or Safeway's anticipated future requirements; or
2. Petitioner's directing Mutual to specific suppliers that he believed would allow Mutual to offer a more competitive price; or
3. Petitioner's rejection of offers similar in price and quantity to those tendered directly by suppliers and subse-

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through the mail. In *United States* v. *Bohonus* (Ninth Circuit, March 27, 1980) No. 79-1449, petition for certiorari pending, the kickbacks were sent directly in the mails. Finally, with regard to *Bohonus* that opinion states:

> "Neither breach of fiduciary duty, nor receipt of secret profits, then, would suffice, standing alone, to show a § 1341 violation; there must be a recognizable scheme formed with intent to defraud. [Citing cases.]"

> quently accepted when placed through Mutual. (Petitioner's Appendix A, page A3.)

To warrant conviction for mail fraud under this scheme, petitioner proposed a definition of "nexus". Quite simply, petitioner argued that each count of the indictment must be directly related to one or more of the elements of the fraud defined by the Court. This has never been demonstrated. The Government does not challenge either the definition of nexus submitted by petitioner nor does it argue that any use of the mails is connected either to petitioner or any element of the scheme found by the Appellate Court.

Irrespective of the inherent propriety of each use of the mails alleged in the indictment and irrespective of any demonstrable connection of any use of the mails with any illegal activity, the Government condemns every mail use by Mutual and its supplier clients. Under this logic, the Government is essentially proposing that *any* use of the mails, irrespective of its contents, irrespective of its purpose, and despite its sheer innocence, is sufficient to constitute a mail fraud offense. Consequently, individual mailings need not be scrutinized for their connection with petitioner or with any illegal activity. Every time Mutual sent any confirmation, or brokerage statement, and every time any supplier sent any check to Mutual, petitioner was guilty of mail fraud whether or not he was connected in any way to the transaction evidenced by any of these documents, whether or not he benefited in any way from any transaction and whether or not he was even employed by Safeway at the time of any transaction.[6]

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6. Petitioner was convicted on all twenty counts of the indictment. The last alleged payment by Petlin and Horwich occurred on approximately August 25, 1974. (T. 134-136, 180, 209-211, 310, 318, 334-335, 351.) Petitioner was discharged by Safeway on February 20, 1975. (T. 76) In this context, five counts of the indictment charged mail use after the last payment was allegedly made to petitioner. Of these, one count charged mail use after petitioner was discharged. (Indictment, Appendix D, page A19, speci-

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Petitioner has never accepted that either the indictment or the evidence adduced at trial established the scheme to defraud defined by the Appellate Court.[7] Nexus, in the context of that scheme, has not been established. Under the rationale of the Court, a precise connection between each use of the mails, that is each count of the indictment, and the scheme proposed by the decision is not necessary. The Government's Brief reiterates this position. That rationale has been challenged in petitioner's original Brief, and petitioner here repeats and reasserts his original arguments. The following discussion responds to the Government's added arguments.

A.

The Government states that the mailings charged in the indictment would not have occurred had there been no scheme. While the record is silent on this point, over the period of time alleged in the indictment, perhaps hundreds of offers were submitted by Mutual to Safeway. Assumedly, hundreds of these offers were accepted for Safeway by petitioner *and other buyers* in his office. The Government essentially argues, without any foundation in the record as to any transaction, that each offer was tainted with the scheme defined by the Appellate Court. Throughout the course of this litigation not even one stained transaction has ever been identified in either the opinion of the Seventh Circuit or any Government Brief.

(Footnote continued from preceding page.)
fically counts 14 through 18.) With regard to these precise counts, the Government maintains a discreet silence.

7. Both Petlin and Horwich testified for the Government under immunity. Their testimony does not support the Government's factual statement. Monies were allegedly paid to petitioner for Mutual business. (T. 135, 310) These witnesses did not testify that monies were paid for information of any kind nor did they identify the scheme found by the Court. The suppliers testifying for the prosecution did not specify any date, participant or transaction connected with the scheme defined in the opinion.

The Government argues that *but for* the scheme Mutual would have been unable to sell to Safeway and therefore none of the mailings alleged in the indictment would have occurred. Safeway did not prohibit the use of brokers.[8] Mutual was in the meat brokerage business. Both Petlin and Horwich were experienced brokers. Both knew the market. Safeway was not their only client. To suggest that Mutual was incapable of tendering proper offers and selling to Safeway without petitioner assumes the business incompetence of Petlin and Horwich. The record belies any such assumption.[9] Arguably, if payments were made to petitioner, it is reasonable to conclude that Mutual sales to Safeway increased. However, even under this view of the case, none of the transactions evidenced by the mailings alleged in the indictment contained any false pretense or misrepresentation. None of the offers submitted by Mutual were padded, excessive or in any manner inflated to provide for any payment to petitioner. In all respects, the contracts negotiated by Mutual with Safeway for its client suppliers represented legitimate obligations by the respective parties. Intrinsically innocent, the mailings charged in the indictment represented a perfectly proper routine procedure in aid of the conduct of business between Safeway, Mutual and the suppliers. The *purpose* of the confirmations, brokerage statements and supplier checks was entirely lawful. These documents cannot support the conviction for mail fraud.

B.

In its final point, the Government argues that the mailings were steps in the collection by Mutual of funds out of which

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8. Safeway's policy with regard to brokers is set out at page 9 of Petitioner's Brief.

9. The record supports the proposition that Petlin and Horwich initially approached petitioner. Thereafter they alone determined what, if anything, they allegedly were to pay to him. (147-149, 198-200, 213-214, 225-228, 313-314, 322, 325-331, 337-339.) None of these alleged payments have ever been connected to any specific transaction.

petitioner received his share. In other words, *but for* the mailings Mutual would not have received the funds with which to pay petitioner. The Government intimates that petitioner was allegedly paid pursuant to a formula or percentage based on Safeway business or from an account maintained by Mutual where only commissions on sales to Safeway were deposited.[10] Petitioner was never paid pursuant to any set agreement nor at any set time nor from any special account (Petitioner's Brief pages 9-11.) Additionally, the Government now appears to argue that petitioner was allegedly paid after the mailings alleged in the indictment. Unquestionably, there is nothing in the record to indicate that any sums were ever allegedly paid to petitioner unless and until commissions were received by Mutual. In *United States* v. *Maze* (1974) 414 U. S. 395, 402, the Court concluded that if the fraud is complete before use of the mails, subsequent mailings cannot establish the crime of mail fraud. Concomitantly, mail uses occurring before the fraudulent scheme begins cannot constitute a use of the mails for the purpose of executing the fraud. *United States* v. *Beall* (D. C. Calif., 1954) 126 F. S. 363, 365-366; *United States* v. *Staszcuk* (Seventh Circuit, 1974) 502 F. 2d 875, 880-881, *modified in banc on other grounds* 517 F. 2d 53, *cert. denied* 423 U. S. 837; See also *Kann* v. *United States* (1944) 323 U. S. 88, 95. In other words, assuming that the parameters of the scheme were properly identified by the Appellate Court, the purpose of the fraud was the exchange of price information, or the direction of suppliers to Mutual, or the rejection of offers by suppliers not associated with Mutual. Nothing in the evidence connects the contents of any mailed document with any of these elements. If this was the scheme, it was completed when the information, direction or rejection occurred. The subsequent mailings alleged in the indictment are too remote to justify conviction under the statute. *Maze, supra.* If, on the other hand, the transactions evidenced by the mailings had to be complete

10. See note 3 at page 3 of this Brief.

before petitioner was allegedly paid anything, and as the mailings were not shown to contain any falsity or misrepresentation, the fraudulent scheme, that is the alleged payments to petitioner, did not occur until after the use of the mails was complete. *Staszcuk supra* and *Beall supra.* None of the alleged payments were sent or received in the mails. In either case, the mailings alleged in the indictment were not made in furtherance of any scheme to defraud.

CONCLUSION

For the reasons stated herein and in the original Brief, Petitioner prays that the Court grant his petition for a writ of certiorari.

Dated: July 1980

Respectfully submitted,

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APPENDIX

APPENDIX E

The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute

In recent years, federal prosecutors and courts have used the federal mail fraud statute, section 1341 of Title 18,[1] to combat political corruption at state and local levels.[2] The greatly pub-

1. 18 U. S. C. § 1341 (1976). *See* note 5 *infra.*

2. In many of these cases, convictions were based on conventional concepts of fraud. *See* Parr v. United States, 363 U. S. 370 (1960) (convictions reversed); United States v. Rauhoff, 525 F. 2d 1170 (7th Cir. 1975); United States v. Bush, 522 F. 2d 641 (7th Cir. 1975), *cert. denied,* 424 U. S. 977 (1976); United States v. Barrett, 505 F. 2d 1091 (7th Cir. 1974), *cert. denied,* 421 U. S. 964 (1975); United States v. Staszcuk, 502 F. 2d 875 (1974), *rev'd in part on rehearing,* 517 F. 2d 53 (7th Cir.), *cert. denied,* 423 U. S. 837 (1975); Bradford v. United States, 129 F. 2d 274 (5th Cir.), *cert. denied,* 317 U. S. 683 (1942); Leche v. United States, 118 F. 2d 246 (5th Cir.), *cert. denied,* 314 U. S. 617 (1941); Shushan v. United States, 117 F. 2d 110 (5th Cir. 1941), *cert. denied,* 313 U. S. 574 (1942). In other cases, convictions were based on an expansive interpretation of fraud in the context of political corruption where citizens were said to have been deprived of certain intangible rights. *See* United States v. Mandel, 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing,* 602 F. 2d 658 (4th Cir. 1979) per curiam, *cert. denied,* 100 S. Ct. 1647 (1980); United States v. Rabbit, 583 F. 2d 1014 (8th Cir. 1978) (convictions arguably based on expansive interpretation of fraud, *cert. denied,* 439 U. S. 1116 (1979); United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976) (expansive interpretation of fraud adopted in dictum; convictions reversed); United States v. Brown, 540 F. 2d 364 (8th Cir. 1976); United States v. Keane, 522 F. 2d 534 (7th Cir. 1975), *cert. denied,* 474 U. S. 976 (1976); United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied,* 417 U. S. 909 (1974); United States v. Fraser, 303 F. Supp. 380 (E. D. La.

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licized convictions of the former governors of Illinois[3] and Maryland[4] were obtained under that section. The language of the statute,[5] however, does not specify political corruption as a target of its proscription. Rather, it uses general terms to prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." These words, the subject of extensive ju-

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1969) (expansive interpretation of fraud adopted in dictum); United States v. Randle, 39 F. Supp. 759 (W. D. La. 1941) (no convictions). It is this latter group of cases—adopting the intangible-rights theory in their expansive definition of fraud—which this comment analyzes.

3. United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974). Otto Kerner, the former governor, was a judge on the United States Court of Appeals for the Seventh Circuit at the time of his conviction.

4. United States v. Mandel, 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing,* 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

5. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, or any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U. S. C. § 1341 (1976).

dicial construction,[6] have provided the statutory basis for punishing certain forms of fraudulent public conduct.

Outside of the arena of the political-corruption, the mail fraud statute has generally been construed as prohibiting schemes in which the victim of the fraud has transferred something of economic value to the defendant.[7] Beginning with United States v. States[8] in 1973, three circuits—the Seventh,[9] Fourth,[10] and Eighth[11]—have applied section 1341 to situations in which corrupt politicians did not deprive the citizens of anything of economic value. Their crime was said to consist of defrauding citizens of their rights to honest government. That an official may now be convicted of a section 1341 violation when his purported scheme to defraud has as its sole object the intangible and abstract political and civil rights of the general citizenry is perhaps the most important development in the history of the mail fraud statute.[12] In reaching their decisions,

6. United States v. McNeive, 536 F. 2d 1245, 1247-48 (8th Cir. 1976).

7. *See* text and notes at notes *infra.*

8. 488 F. 2d 761 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

9. *See* United States v. Keane, 522 F. 2d 534 (7th Cir. 1975), *cert. denied,* 474 U. S. 976 (1976); United States v. Isaacs, 493 F. 2d 1124 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974).

10. United States v. Mandel, 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing,* 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

11. *See* United States v. Brown, 540 F. 2d 364 (8th Cir. 1976); United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976) (dictum); United States v. States, 488 F. 2d 761 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

12. This development has been observed by two prior commentators. Note, *A Survey of the Mail Fraud Act,* 8 MEM. ST. U. L. REV. 673, 679-80 (1978); Comment, *Survey of the Law of Mail Fraud,* 1975 U. ILL. L. F. 237, 246-48.

these courts have relied on the broad language of section 1341,[13] prior Supreme Court decisions,[14] and other case law construing section 1341.[15]

This comment addresses the question whether section 1341 properly reaches political corruption depriving citizens of their intangible rights to honest government. First, it reviews the schemes that have been held illegal under section 1341 in political-corruption cases. The comment then analyzes the statute, the legislative history, the meaning of "fraud" in the nineteenth century, and the prior case law, and concludes that section 1341 should not be read to extend to political-corruption cases.

I. Fraudulent Schemes Involving Citizens' Intangible Rights

United States v. *Isaacs*[16] and *United States* v. *Mandel*[17] illustrate the type of scheme involved in the intangible-rights cases.

13. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1360; United States v. States, 488 F. 2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

14. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1360; United States v. Isaacs, 493 F. 2d 1124, 1150 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974).

15. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1359-62; United States v. States, 488 F. 2d 761, 764-66 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

16. 493 F. 2d 1124 (7th Cir. 1974), *cert. denied*, 417 U. S. 976 (1974).

17. 591 F. 2d 1347 (4th Cir. 1979). The jury convicted Mandel. The court of appeals affirmed with respect to the theory of the crime, but remanded on account of trial error. 591 F. 2d 1347 (4th Cir. 1979). In a rehearing en banc, a majority of the court upheld the ruling of the trial court as to the theory of the crime, and an equally divided court affirmed the district court on the question of trial error, and so reinstated the conviction. 602 F. 2d 653 (4th Cir. 1979), *cert. denied*, 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

In *Isaacs,* the former governor of Illinois, Otto Kerner, and his close political associate. Theodore Isaacs, were convicted under section 1341 of using the mails to defraud "the State of Illinois and its citizens of the honest and faithful services of Kerner as governor."[18] The receipt of bribes provided the factual basis for the prosecution's theory of fraud.[19] Kerner, acting through Isaacs, arranged to purchase race track stock at below-market prices from the wealthy owner of Chicago-area racing interests, in return for his agreement to promote those interests before the state racing board and the state legislature. Although both Kerner and Isaacs made substantial monetary gains on their receipt of the stock,[20] there was no direct monetary loss to the state on the transaction. Indeed, state revenues from horse racing actually increased during the period in which Kerner was promoting the interests of the person from whom he had purchased the stock.[21]

The defendants' enrichment came directly from the person who advanced them the putative bribe—a person who was neither deceived nor defrauded.[22] For whatever reason, Illinois authorities chose not to bring state charges for receiving bribes. Instead, the federal authorities—relying on the fact that Isaacs and Kerner made several mailings in connection with the scheme[23]—

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18. 493 F. 2d at 1149.

19. *Id.* at 1146, 1149.

20. *Id.* at 1139.

21. *Id.*

22. The race track owner who advanced the bribes, Mrs. Majorie L. Everett, was named as an unindicted coconspirator for her role in the transaction and served as a principal witness for the prosecution at the trial. *Id.* at 1131-32.

23. For example, Isaacs and Kerner devised the pretext of a fictitious loan to make it appear as if they had purchased the stock in question four years before they really obtained it. Under this pretext, the gain they made on the stock transaction would not have

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brought charges of mail fraud. To make the conduct involved fit within any arguable concept of fraud, the federal authorities had to turn to the intangible-rights theory.

The citizens of Illinois were the only persons even conceivably deceived or defrauded by the governor's conduct.[24] Since they relinquished nothing of economic value, it was only by asserting that they had been deprived of certain intangible political rights that they could be called victims of any fraudulent scheme.

In *United States* v. *Mandel*,[25] the defendant, Marvin Mandel, governor of Maryland, was—along with his codefendants—convicted under section 1341 of devising a scheme "to defraud the citizens of the State of Maryland and her governmental departments, agencies, officials and employees . . . of the right to conscientious, loyal, faithful, disinterested and honest government through bribery and non-disclosure and concealment of material information."[26] Like Kerner, Mandel became the sub-

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appeared so abrupt and obvious. To complete the fiction, "interest" was paid on this bogus loan, and Kerner mailed an Internal Revenue Service form to the supposed lender to notify her that she had been reported as receiving this "interest." This mailing provided the basis of one of the mail fraud counts in the indictment. *Id.* at 1137.

24. *Id.* The defendants were also convicted of "defrauding the racing associations of Illinois of the right to obtain racing dates free from corruption and bribery." *Id.* at 1149. But it appeared from the record that no competitor of the racing interests lost racing dates as a result of the scheme. *Id.* at 1139.

25. 591 F. 2d 1347 (4th Cir.), *conviction aff'd in relevant part on rehearing*, 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied*, 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

26. 591 F. 2d at 1359-60. The indictments also charged the defendants with "directly and indirectly" obtaining money. *Id.* at 1353. But the court of appeals indicated that it affirmed the theory of the crime in *Mandel* solely on the basis of the intangible-rights doctrine. *Id.* at 1359-60, 1359 n. 6.

ject of federal criminal prosecution in connection with an alleged scheme to promote racetrack interests.[27] In 1972, Governor Mandel had supported certain racetrack legislation then in a critical stage of enactment before the Maryland General Assembly. The legislation became law, did it then became known that the law favored the interests of a group of racetrack investors that included friends and business associates of the governor—some of whom had given valuable personal property as well as business interests to Mandel.[28] Although Mandel denied having knowledge that the legislation would favor this group, the court of appeals held that his conviction of mail fraud was possible because his conduct amounted to either bribery or concealment of material information and that such conduct was proscribed by section 1341.[29] As in *Isaacs,* Mandel's actual enrichment did not flow directly from anyone Mandel even arguably defrauded or deceived. It was, therefore, necessary to resort to what amounts to a constructive theory of fraud, by finding that Mandel's alleged involvement in bribery and nondisclosure of material facts fraudulently deprived citizens of their right to honest government.

II. Construction of the Mail Fraud Statute

Section 1341 prohibits "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent

27. The circumstances in *Mandel* were far more subtle than those in *Isaacs.* Unlike the situation in *Isaacs,* all the principals in the alleged fraudulent scheme in *Mandel* were prosecuted, and the case against them consisted of indirect evidence. As the court of appeals stated, "It is . . . apparent that the case could not have been submitted on the theory that Governor Mandel had a direct interest in the race track business, for no direct connection on his part was either alleged or proven." *Id.* at 1364.

28. Mandel received some clothing for himself and jewelry for his wife. In addition, he was assigned interests in real estate. *Id.* at 1356-57.

29. *Id.* at 1360, 1363, 1365.

pretenses, representations, or promises."[30] Whether this provision proscribes schemes to deprive citizens of their intangible rights as well as schemes "for obtaining money or property" depends on the meaning of "any scheme or artifice to defraud." Both the legislative history[31] and the meaning of the word "fraud" in the nineteenth century[32] indicate that the statute only reaches schemes that have as their goal the transfer of something of economic value to the defendant.[33]

A. Legislative History

1. *The Origins of the Statute.* The current section 1341 originated in section 301 of the Act of June 8, 1872,[34] an act which consolidated and recodified the postal laws. Although it was enacted as part of a general recodification, section 301 was original legislation and had no predecessor.[35] This statute proscribed "any scheme or artifice to defraud," language which is retained in section 1341 today.[36]

The postal legislation, of which the mail fraud statute constituted a part, was in large part the work of a commission appointed under congressional authority to revise and consolidate the postal laws,[37] and of a committee of postal officials which

30. *See* note 5 *supra.*

31. *See* text and notes at notes ..... *infra.*

32. *See* text and notes at notes ..... *infra.*

33. Most courts have concluded that the legislative history is too scanty to be of much help in construing section 1341. *See, e.g.*, United States v. McNeive, 536 F. 2d 1245, 1248 (8th Cir. 1976).

34. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

35. *See* M. BEAMAN & A. MCNAMARA, INDEX ANALYSIS OF THE FEDERAL STATUTES, 1789-1873, at 525, 546 (1909).

36. *See* note 5 *supra.*

37. The commission was created by the Act of June 27, 1866, 14 Stat. 74.

then revised the Postal Code proposed by the commission.[38] The Postal Code prepared by the commission did not mention "scheme to defraud." The committee of postal officials, noting this omission and concerned that current law did not adequately protect citizens from frauds conducted through the mails, added a section to the Code so that "power [might] be given to the officers of the [post office] department to prevent the operation of lottery gamblers throughout the postal service."[39] Congress adopted the substance of this recommendation in section 149[40] of the Act of 1872, and also enacted two other sections dealing with fraud, section 300[41] and section 301,[42] the latter being the predecessor of the current section 1341.

The rationale for the enactment of section 301 was essentially the same as that for other antifraud provisions of the 1872 Act. The committee of postal officials, as indicated before, predicated their recommendation for new fraud legislation on the need "to prevent the frauds which are perpetrated by lottery swindlers through the mails"[43] and drafted section 149, which made it illegal for anyone to mail "letters or circulars concerning . . . lotteries . . . or other similar . . . schemes devised . . . to deceive and defraud the public for the purpose of obtaining money under

38. *See* H. R. EXEC. DOC. NO. 1, PT. 3, 41st Cong., 3d Sess. 25 (1870).

39. Brief for Petitioner at 25-26, Fasulo v. United States, 272 U. S. 620 (1962) (quoting Report of Committee of Post Office Officials 19-20 (March 30, 1870).

40. Act of June 8, 1872, ch. 335 § 149, 17 Stat. 302 (repealed 1909).

41. *Id.*, § 300, 17 Stat. 322 (current version at 39 U. S. C. § 3005 (1976)).

42. *Id.*, § 301, 17 Stat. 323 (current version at 18 U. S. C. § 1341 (1976)).

43. Brief for Petitioner at 25-26, Fasulo v. United States, 272 U. S. 620 (1962) (quoting Report of Committee of Post Office Officials 19-20 (March 30, 1870)).

false pretences."[44] Section 149, as drafted by the postal commission, reached neither the principals of the scheme nor fraudulent schemes to obtain property rather than money.[45] Congress filled this gap by adding section 301.

Section 301 reached the principals, not just those who did the mailing, of schemes described in section 149.[46] It did not prohibit or restrict only fraudulent schemes involving money, as did the literal words of section 149, but was phrased in more general language to proscribe "any scheme or artifice to defraud." Congressman Farnsworth of Illinois, House sponsor of the recodification legislation, explained that sections 300 and 301 were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people in the country."[47] This background suggests that Congress in the fraud legislation of 1872 did not use the term "fraud" in some new and technical way, but rather intended to prohibit schemes that were within the conventional usage of the term and involved use of the federal mails. There is, moreover, no suggestion that Representative Farnsworth intended to proscribe any form of trickery or deception other than schemes to acquire the property of others.

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44. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302 (repealed 1909).

45. *Id.*

46. Section 149 provided that "it shall not be lawful to convey by mail" matter designed to promote fraudulent schemes. *Id.* Section 301 was aimed directly at "any person [who] devised . . . any scheme or artifice to defraud" that involved the mails. *Id.* § 301.

47. CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). Representative Farnsworth's remarks came during the course of debate on H. R. 2295, the recodification bill introduced in the forty-first Congress. Failing to pass in that Congress, the recodification legislation—containing intact the sections on fraud—was reintroduced as H. R. 1 in June 8, 1872, ch. 335, 17 Stat. 283 (codified in scattered sections of 39 U. S. C. (1976)).

2. *The 1889 Amendment.* In 1889, Congress amended the mail fraud statute by adding specific prohibitions against schemes dealing in "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," or "green cigars."[48] The history of the amending legislation indicates that these terms were added at the request of postal authorities, who felt that the amendment was needed to reach certain counterfeiting schemes then prevalent.[49] This amending legislation demonstrates that the original prohibition of "any scheme or artifice to defraud" was never intended to operate as a broad prohibition of all schemes to deceive. If it had been so intended, it would not have been necessary to amend the statute in order to reach counterfeiting schemes. The amending legislation is also important in that Congress used specific, rather than general, language to reach such schemes. A statute amended in such piecemeal fashion cannot be authority for a doctrine as expansive as that of intangible rights.

3. *The 1909 Amendment.* In 1909, in the course of general revision of the federal penal code, Congress amended the mail fraud statute by adding after the original prohibition of "any scheme or artifice to defraud" the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[50] Although this amendment is of critical importance in determining whether the mail fraud statute *only* reaches schemes "for obtaining money or property," the enacting Congress apparently regarded this as an unim-

48. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873.

49. S. REP. No. 2566, 50th Cong., 2d Sess. (1889).

50. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. There were other amendments to the statute in addition to the one indicated. All are printed without explanation in S. REP. No. 10 PT. 2, 60th Cong., 1st Sess. 238-240 (1908). Only one of these other amendments has any relevance to this inquiry. This amendment added schemes dealing in "green goods" to the list of prohibitions originally set out in 1889, *see* text at note 48 *supra.*

portant modification. Congress did not even require an explanation of the change from the sponsor of the amending legislation during the course of floor debates.[51]

The courts applying section 1341 in intangible-rights cases have relied on the original prohibition of "any scheme . . . to defraud." They have treated that language as independent of and broader than the clause added to 1909.[52] These courts thus interpret the statute as proscribing two types of conduct: "schemes . . . to defraud" *or* schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

In *United States* v. *States*,[53] for example, the Court of Appeals for the Eighth Circuit ruled that the 1872 phrase and the 1909 phrase should be read "independently, rather than complementary of one another."[54] That is, the original expression "having devised or intending to devise any scheme or artifice to defraud" should be read as entirely independent of the later expression "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," as if the two phrases were merely "part of an uninterrupted listing

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51. *See, e.g.*, 42 CONG. REC. 1026 (1908) (remarks of Sen. Heyburn). In explaining the recodified and amended mail fraud statute, Senator Heyburn, the sponsor of the legislation, dealt with one change in the law affecting mailings made from outside the United States, noting: "I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation." *Id.*

52. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1360; United States v. McNeive, 536 F. 2d 1245, 1247-48 (8th Cir. 1976); United States v. States, 488 F. 2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

53. 488 F. 2d 761 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

54. *Id.* at 764.

of a series of obviously diverse schemes."[55] According to such a reading, "any scheme or artifice to defraud" would not be modified by "for obtaining money or property." In this form, the court concluded, the original 1872 language would support a theory in which the obtaining of money or property plays no essential role. This construction of the statute should, however, be rejected since the courts that adopted it did not consider the import of a crucial piece of legislative history.

The 1909 amendment was enacted without comment or debate because it merely codified the prior Supreme Court decision of *Durland* v. *United States*.[56] In *Durland*, the Court interpreted the mail fraud statute for the first time and held inapplicable a particular common-law defense. In most jurisdictions, one could not be convicted of the crime of obtaining money or property by false pretenses if he had merely made false promises. The Supreme Court held that this defense did not apply to the federal crime of mail fraud. The key language of that decision—"some schemes may be promoted through mere *representations and promises* as to the future, yet are nonetheless schemes and artifices to defraud"[57]—reappears in the language of the amendment: "representations, or promises." This change in the statute was submitted by a special commission to Congress in a modified criminal code, and the commission cited *Durland* in the margin of its report next to the revised

55. *Id.* The district court in *States* also presented an argument for reading the two phrases independently, 362 F. Supp. 1293, 1296 (E. D. Mo. 1973), relying on United States v. Young, 232 U. S. 155 (1914). But *Young* stands for the proposition that there is no essential connection between the jurisdictional requirement of a mailing and the scheme to defraud. The holding of *Young* does not address the matter in consideration here, the relation between the 1872 phrase and the 1909 phrase, because both phrases are relevant to the fraudulent-scheme element of the crime.

56. 161 U. S. 306 (1896).

57. *Id.* at 313.

mail fraud statute.[58] Thus, the 1909 amendment was designed to expand narrowly the crime of mail fraud by removing one particular common-law defense.[59]

Reading "any scheme . . . to defraud" independently of "for obtaining money or property" strips the 1909 language of any meaning.[60] If the 1909 amendment merely lists a new and

58. *See* S. Doc. No. 68, Pt. 2, 57th Cong., 1st Sess. 64 (1901) (report of the Committee to Revise and Codify the Criminal and Penal Laws of the United States). *See also* Pearce, *Theft by False Promises*, 101 U. Pa. L. Rev. 967, 980 (1953) (concluding that the 1909 amendment codified *Durland*).

59. One possible alternate explanation was offered by Chief Justice Taft in Hammerschmidt v. United States, 265 U. S. 182, 189 (1924), *discussed in* text and notes *infra*. The Chief Justice indicated that the 1909 amendment narrowed the scope of the statute after the very broad interpretation given it in Horman v. United States, 116 F. 350 (6th Cir.), *cert. denied*, 187 U. S. 641 (1902). *Horman* had extended the crime of mail fraud to reach a scheme involving pure extortion with no apparent fraud. The Chief Justice read the 1909 amendment as making it clear that the proscribed conduct must include some element of deceit or trickery. 265 U. S. at 189. This explanation is not, however, inconsistent with the thesis that the 1909 amendment codified *Durland*.

60. Such a reading would be inconsistent with several basic principles of statutory construction. "It is the duty of the court to give effect, if possible, to every word and clause of a statute." Montclair v. Ramsdell, 107 U. S. 147, 152 (1882). *See also* Mastro Plastics Corp. v. NLRB, 350 U. S. 270 (1956) (Frankfurter, J., dissenting); United States v. Menasche, 348 U. S. 528, 538-39 (1955); Wilkinson v. Leland, 27 U. S. (2 Pet.) 627, 662 (1829). Another maxim of construction requires the meaning of otherwise doubtful words to be determined by reference to associated words. *See, e.g.*, Patton v. United States, 159 U. S. 500, 509 (1895); Neal v. Clark, 95 U. S. 704, 708-09 (1877). Unless the 1909 amendment is read together with the earlier language, its meaning will be doubtful *and* it will be without effect—"an idle collection of words." Mastro Plastics Corp. v. NLRB, 350 U. S. 270, 297 (1956) (Frankfurter, J., dissenting). Such an interpretation is unacceptable,

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separate crime concerned with "obtaining money and property," as the Eighth Circuit suggested, then the amendment was unnecessary. The mail fraud statute had been used to prosecute crimes against property well before 1909.[61] Moreover, reading the two phrases independently defeats Congress's aim of codifying *Durland;* the common-law defense, under such a reading, would be available when the defendant is prosecuted for schemes to defraud rather than for schemes to obtain money or property by false or fraudulent pretenses. If, on the other hand, one treats the insertion of the phrase "for obtaining money or property" as merely serving to illustrate what was comprehended by schemes to defraud, then the words "by means of false or fraudulent pretenses, representation, or promises" apply to all schemes to defraud, and *Durland* was codified. Once the 1909 amendment is seen as the codification of *Durland,* that amendment is necessarily inconsistent with the intangible-rights theory: Congress codified *Durland's* interpretation of "any scheme or artifice to defraud" as applicable only to crimes against property.

Subsequent amendments to section 1341 have not affected its substance.[62] The intangible-rights theory is predicated on statu-

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for "[t]he cardinal principle of statutory construction is to save and not to destroy." NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 30 (1937).

61. *See* Durland v. United States, 161 U. S. 306, 312 (1896). *See also* text and notes at notes *supra.*

62. In 1948, certain colorful words used to describe fraudulent schemes were removed. *See* Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763. The House Report accompanying the amending legislation noted that this change was made to delete "the obsolete argot of the underworld" and that it, together with the elimination of other language considered to be "surplusage," was effected "without change of meaning" in the statute. H. R. REP. No. 304, 80th Cong., 1st Sess., A100 (1948). The 1949 and 1970 amendments were also of no substantive importance. *See* Act of May 24, 1949, ch. 139, § 34, 63 Stat. 89 ("dispose of" substituted for "dispose or"); Postal Reorganization Act, Pub. L. No. 91-375, § 6(j)(11), 84 Stat. 719 (1970) ("Postal Service" substituted for "Post Office Department").

tory language originally drafted in 1872 and last significantly amended in 1909. An analysis of the legislative history from this period indicates that Congress intended the statute to proscribe certain crimes against property. This construction receives additional support from the meaning of the word "fraud" at the time Congress prohibited "any scheme or artifice to defraud."

B. The Meaning of Fraud in the Nineteenth Century

In the nineteenth century, the term fraud referred to a wide variety of crimes.[63] Most frauds were prohibited by statute, but some were proscribed by only the common law.[64] And many of those frauds prohibited by the common law in America were ones originally prohibited by English statutes.[65] Even with respect to the frauds prohibited *only* by statute, courts developed so-called common-law principles of fraud as glosses upon the statutes.[66]

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63. *See generally* R. PERKINS, CRIMINAL LAW 231-33, 296-98 (2d ed. 1969).

64. For example, larceny by trick was a crime at common law. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAWS § 85, at 627 (1972).

65. One English statute, part of the common law in all American jurisdictions, prohibited obtaining property by means of a "false token or counterfeit letter made in any other Man's Name." 33 Hen. 8, ch. 1 (1541). The English false pretense statute, 30 Geo. 2, c. 24, § 1 (1757), was enacted in 1757 and is part of the common law in those American jurisdictions that incorporate English statutory and common law as of 1775. *See* W. LAFAVE & A. SCOTT, *supra* note 64, § 90, at 655 & nn.3-5 (1972).

66. *See, e.g.*, State v. Rowley, 12 Conn. 101 (1837) (using constructions of two English fraud statutes, 33 Hen, 8, c. 1 (1541); 30 Geo. 2, c. 24, § 1 (1757), as aids in construing Connecticut false-pretenses statute); People v. Clough, 17 Wend. 351 (N. Y. Sup. Ct. 1837) (in construing the New York false-pretenses statutes,

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Although courts have refused to define fraud,[67] crimes of fraud have generally been regarded as crimes against property involving some form of trickery or deception.[68] For example, in the nineteenth century, the prominent forms of fraud were embezzlement, false pretenses, forgery, and larceny by trick.[69] Each of these frauds was a crime against property.[70]

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court relied on English common-law concepts of fraud and judicial constructions of the original false-pretenses statute, 30 Geo. 2, c. 24, § 1 (1757)); People v. Stone, 9 Wend. 180 (N. Y. Sup. Ct. 1832) (using English common law and statutory law of fraud in construing state's false-pretenses statute).

Federal courts construing the mail fraud statute have considered common-law principles of fraud. *See, e.g.,* Parr v. United States, 363 U. S. 370, 400 (1960) (Frankfurter, J., dissenting) (reference to "the common-law offense of obtaining money or goods under false pretenses"); United States v. Mandel, 591 F. 2d at 1361 ("common law concepts of fraud and false pretenses").

67. *See* Blachly v. United States, 380 F. 2d 665, 671 (5th Cir. 1967); Gregory v. United States, 253 F. 2d 104, 109 (5th Cir. 1958); Weiss v. United States, 122 F. 2d 675, 681 (5th Cir.), *cert. denied,* 314 U. S. 687 (1941); Foshary v. United States, 68 F. 2d 205, 211 (8th Cir. 1933), *cert. denied,* 291 U. S. 674 (1934).

68. *See* 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAWS §§ 565-590 (7th ed. 1882) (major fraudulent crimes are classified as crimes against property); 2 W. RUSSELL, RUSSELL ON CRIME 1203-1501 (11th ed. J. Turner 1958) (all major crimes of fraud are listed as "offenses against property"); 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 121-22 (1883) (referring to fraud as "either actual injury or possible injury . . . by means of . . . deceit or secrecy" in a context of economic crimes). *See also* Friedman, *Intent to Defraud Reconsidered,* 1960 CRIM. L. REV. 530, 537-38 (explaining economic context of Stephen's characterization of fraud).

69. *See, e.g.,* 2 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW §§ 318-383, at 182-220 (8th ed. 1892) (embezzlement); *id.* §§ 409-488, at 235-79 (false pretenses); *id.* §§ 521-612, at 300-48 (forgery); C. KENNY, OUTLINES OF CRIMINAL LAW 206

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Thus, even if the mail fraud statute's phrase "scheme . . . to defraud" proscribes all crimes encompassed by the generic term "fraud," it reaches only certain crimes against property.

It is, however, likely that the mail fraud statute uses the term "defraud" in a specific, rather than generic, sense. Indeed, the mail fraud statute should properly be interpreted as proscribing the fraud of false pretenses. The typical false pretense statute is almost identical to section 1341 as amended in 1909.[71] In

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(1902) (larceny by trick); *id.* at 228-39 (embezzlement); *id.* at 240-51 (false pretenses); *id.* at 255-63 (forgery); 2 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 1131-51 (R. Ross & G. McClure eds. 1923) (larceny by trick); *id.* at 1304-32 (embezzlement); *id.* at 1400-78 (false pretenses); *id.* at 1505-91 (forgery).

70. *See* Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 (1894) (dictum) (embezzlement); 2 J. BISHOP, *supra* note 68, § 325, at 186-87 (embezzlement); 2 W. RUSSELL, *supra* note 68, at 1048-82 (larceny by trick); *id.* at 1277-83 (embezzlement); *id.* at 1421-23 (forgery); 2 F. WHARTON, WHARTON'S CRIMINAL LAW § 915, at 1219-20 (12th ed. J. Ruppenthal 1932) (forgery); text and notes at notes 76-80 *infra* (false pretenses). Because forgery was an inchoate crime, it was not necessary that the forger *succeed* in obtaining something of value. *See* 2 J. BISHOP, *supra* note 69, § 524, at 301-02.

71. *See, e.g.*, MASS. GEN. STAT. ch. 161, § 54 (1860) ("Whoever designedly, by a false pretense . . . with intent to defraud, obtains from another person any property"); MO. REV. STAT. ch. 36, § 4565 (1909) ("Every person who . . . shall designedly . . . by any . . . false pretense . . . obtain from any person any money, personal property . . . or other valuable thing"); N. Y. REV. STAT. pt. 4, ch. 1, tit. 3, § 58 (1875) ("Every person who, with intent to cheat or defraud another, shall designedly . . . by any . . . false pretense . . . obtain from any person any money, personal property, or valuable thing"). *See also* 30 Geo. 2, ch. 24 § 1 (1757) (the original English false pretense statute, which is part of the common law in some American jurisdictions) ("all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, good, wares, or merchandizes, with

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addition, the Supreme Court,[72] other courts,[73] and commentators[74] have treated the mail fraud statute as one proscribing the fraud of false pretenses. This narrower construction is consistent with the maxim that criminal statutes should be narrowly construed and saves the statute from a possible constitutional attack on vagueness grounds.[75]

During the period of enactment and critical amendment of the mail fraud statute, it was impossible to obtain a conviction

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intent to cheat or defraud any person or persons of the same . . . shall be . . . fined and imprisoned").

72. *See* Durland v. United States, 161 U. S. 306 (1896) (implicitly treating the mail fraud statute as a false-pretenses statute).

73. *See, e.g.*, People v. Ashley, 42 Cal. 2d 246, 261 n. 3, 267 P. 2d 271, 281 n. 3 (1954) (Traynor, J.) (using the U. S. Supreme Court's construction of the mail fraud statute in *Durland* as an aid in construing the California false-pretenses statute).

74. *See, e.g.*, F. INBAU, J. THOMPSON & A. MOENSSENS, CASES AND COMMENTS ON CRIMINAL LAW 595-600 (1973) (mail fraud statute is presented in same section as false pretenses); W. LAFAVE & A. SCOTT, *supra* note 64, § 90, at 671 (1972) (the mail fraud statute presented as a crime related to false pretenses); R. PERKINS, *supra* note 63, at 297 n. 6; Pearce, *supra* note 58, at 979.

75. For instance, if the statute is not limited by any common-law fraud principles, thus proscribing all conduct considered contrary to public policy and morals by the courts, *see Mandel*, 591 F. 2d at 1360-61, it might be struck down as unconstitutional. In United States v. L. Cohen Grocery Co., 255 U. S. 81 (1921), the Supreme Court struck down a federal criminal statute on void-for-vagueness grounds. This action, however, was exceptional because the Court has seldom struck down a *federal* statute as unconstitutional for vagueness. *See* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 104 U. PA. L. REV. 67, 83 n.80 (1960). "[The] Court has consistently favored that interpretation of legislation which supports its constitutionality. . . . Only if no construction can save the Act [in question] from [the] claim of unconstitutionality are we willing to reach that result." Screws v. United States, 325 U. S. 91, 98, 100 (1945).

for false pretenses unless the defendant had directly received something of economic value from the victim of the supposed fraudulent scheme. Moreover, those decisions permitting convictions for fraud although the victim has suffered no economic loss were not inconsistent with the general requirement that the victim transfer something of economic value to the defendant.

1. *The American Decisions Regarding Statutes Proscribing the Fraud of False Pretenses.* In 1907, in the decision of *In re Waterman,*[76] the Supreme Court of Nevada enunciated what had been an accepted principle of law for at least the preceding half century: "The obtaining and possession of something of value is an essential ingredient of the crime of obtaining money, goods or other property, under false pretenses, and where this essential ingredient is lacking, there is no crime."[77] *Waterman* involved a habeas corpus proceeding in which a man held in custody by Nevada authorities challenged the sufficiency of his indictment for false pretenses in Iowa, whose officials were seeking his extradition. The Nevada court carefully analyzed the formal indictment against Waterman, comparing it with the requirement of the Iowa false-pretenses statute.[78] The court found the indictment "fatally defective" because it failed to allege that Waterman had received anything of value from the

76. 29 Nev. 288, 89 P. 291 (1907).

77. *Id.* at 299, 89 P. at 295 (citing Jamison v. State, 37 Ark. 445 (1881)). *Accord,* Connor v. State, 29 Fla. 445, 10 So. 891 (1892); State v. Clark, 72 Iowa 30, 33 N. W. 340 (1887); State v. McGinnis, 71 Iowa 685, 33 N. W. 338 (1887); State v. Anderson, 47 Iowa 142 (1877); State v. Lewis, 26 Kan. 123 (1881); Bracey v. State, 64 Miss. 26, 8 So. 165 (1886); Willis v. People, 26 N. Y. Sup. Ct. 84 (App. Div. 1879).

78. IOWA CODE ANN. § 5041 (West 1897) ("If any person designedly and by false pretense, . . . with intent to defraud, obtain from another any money, goods or other property, . . . he shall be imprisoned . . . or . . . fined"), *quoted in* In Re Waterman, 26 Nev. 288, 297-98, 89 P. 291, 294-95 (1907).

victim in connection with the alleged scheme to defraud, and accordingly granted the writ.[79]

Commonwealth v. *Harkins*[80] illustrates the extent to which courts went in preserving the requirement that the defendant obtain some tangible thing of value. The defendant, by falsely asserting that he had sustained personal injuries for which the victim of the deception bore responsibility, obtained a consent judgment against the victims. The court ruled that the judgment could not serve as the basis for a conviction for false pretenses because the defendant had received money only after the order had been entered. The entry of the order marked the termination of the scheme and payment afterwards under the order was entirely lawful.[81]

Some nineteenth-century courts permitted convictions for false pretenses although the victim suffered no economic loss. These decisions, however, are not inconsistent with the requirement that the victim transfer something of economic value to the defendant. In *LaMoyne* v. *State*,[82] The Texas Court of Criminal Appeals affirmed the conviction of a farmer who had been accused of swindling[83] a merchant of certain machinery. The farmer had obtained the machinery on credit by granting the merchant a mortgage on his crops and farm—a transaction to which the merchant agreed only after the farmer falsely represented that there were no liens on his property. Since the farmer had retained sufficient equity in the property to secure fully his debt to the merchant, the merchant was able to recover the machinery and sell it without any apparent loss. The court found that the lack of any economic loss to the merchant would not

79. 29 Nev. at 298-300, 89 P. at 295.

80. 128 Mass. 79 (1880).

81. *Id.* at 82-83. Such payment was in fact a legal obligation.

82. 53 Tex. Crim. 221, 111 S. W. 950 (Crim. App. 1908).

83. The crime of false pretenses is known as "swindling" in Texas. *See* W. LaFave & A. Scott, *supra* note 64, § 90, at 655 n. 2.

serve as a defense to swindling.[84] Rather the court found that the crime is determined by "the value of the property the possession of which is so fraudulently acquired."[85]

People v. *Bryant*[86] was a similar case. The defendant had sold to the victim a promissory note secured by a mortgage, but only after the defendant had falsely represented that the land covered by the mortgage was "good, tillable land, of good soil and of great value."[87] The accused argued in his defense that since the mortgage served only to secure the note, and since it had not been shown that the maker of the note would not fulfill his obligation, the "indictment fail[ed] to show that [the victim had] been defrauded of any of her property."[88] The California Supreme Court held, however, that "[i]f a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated."[89]

LaMoyne and *Bryant* thus stand for the proposition that a conviction for the fraud of false pretenses can be sustained even when the victim has suffered no economic loss.[90] The cases

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84. 53 Tex. Crim. at 224, 111 S. W. at 950. In denying a motion for rehearing, the court explicitly overruled three of its own previous decisions holding that lack of economic loss was a defense to the crime. *Id.* at 225-30, 111 S. W. at 951-54.

85. *Id.* at 229, 111 S. W. at 953. The defendant had been convicted of misdemeanor swindling—a crime limited to amounts under $50. In dictum, the appellate court noted that he should have been charged with felony swindling, since the value of the farm machinery obtained was in excess of $50. *Id.* at 224, 111 S. W. at 450.

86. 119 Cal. 595, 51 P. 960 (1898).

87. *Id.* at 596, 51 P. at 960.

88. *Id.* at 597, 51 P. at 961.

89. *Id.*

90. For cases addressing the relevance of economic loss, see, for example, Commonwealth v. Ferguson, 135 Ky. 32, 121 S. W. 967

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do not signal, however, a departure from the requirement that something of economic value be obtained from the victim. In *LaMoyne*, the defendant acquired farm machinery from the victim, and in *Bryant*, the money paid for the promissory note.

2. *The English Case Law.* In construing the English false-pretenses statute,[91] the English courts have consistently required that the defendant receive something of economic value from the victim.[92] For example in *Rex* v. *Wavell*,[93] the court held that the defendant could not be convicted for a scheme in which he acquired credit from a bank. Although the defendant's creditors had benefited from the transaction the defendant had not received any money, chattel, or other item of value. The court

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(Footnote continued from preceding page.)
(1909); State v. Miller, 212 Mo. 73, 111 S. W. 18 (1908) (dictum); People v. Cook, 48 N. Y. Sup. Ct. 67 (App. Div. 1886). *See also* cases cited in Annot., 53 A. L. R. 2d 1215 (1957).

91. The false-pretenses statute construed by the cases considered here reads, in part: "[I]f any Person shall by any false Pretence obtain from any other Person any Chattel, Money, or valuable Security, with Intent to cheat or defraud any Person of the same, every such Offender . . . shall be liable . . . to be transported beyond the Seas for the Term of Seven Years." 7 & 8 Geo. 4, c. 29, § 53 (1827).

92. In a decision under a forgery statute, Welham v. Director of Public Prosecutions, [1961] A. C. 103, the House of Lords faced a problem of statutory interpretation similar to the one in this inquiry. In construing the Forgery Act of 1913, 3 & 4 Geo. 5, c. 27, the Lords were called upon to decide whether the substance of defrauding consists of mere deceit, or deceit with the intent to cause economic loss. The question was resolved by finding that the concept of fraud had not been confined to the causing of economic loss since at least the mid-nineteenth century. *Id.* at 124 (Lord Radcliffe), 131 (Lord Denning). But their decision had no impact on the line of cases requiring the acquisition of something of value from the victim, for the issue before the House was not framed in terms of this quite separate question.

93. 1 Mood. 224, 168 Eng. Rep. 1249 (K. B. 1829).

ruled that the extension of credit alone did not, therefore, fall within the ambit of the statute.[94]

In *Regina* v. *Eagleton*,[95] the defendant received a credit on account for goods he knew to be defective. In affirming the conviction for *attempting* to obtain money under false pretenses, the court noted that the defendant had not yet received actual payment, and thus could not be convicted of the crime of *obtaining* something under false pretenses.[96] He, too, had received nothing of value from his victim.

Thus, the legislative history of the statute and the contemporaneous understanding of fraud indicate that the scheme or artifice to defraud is a scheme or artifice to trick the victim into transferring something of economic value to the defendant. When corrupt politicians deprive citizens of their intangible

94. *Id.* at 230, 168 Eng. Rep. at 1252. Regina v. Garrett, 1 Dears. C. C. 232, 169 Eng. Rep. 707 (K. B. 1853), is another case in which the statute was strictly construed. The defendant, an international traveler, received money on a forged letter of credit from the branch of a British financial firm in Russia, and this firm in turn sought reimbursement from another bank in London on the basis of the second bank's obligations under the letter of credit. The defendant was convicted of false pretenses for defrauding the second bank in London. Lord Campbell did not, however, allow the conviction to stand, since the defendant received nothing from the second bank. The false pretense was made to the second bank, but the money was received from the first bank. "A gross fraud has been committed, but not an obtaining money under false pretences within the statute." *Id.* at 241, 169 Eng. Rep. at 711. The prosecution of the defendant in this case resembles prosecutions for political corruption based on the intangible-rights theory in that an unlawful acquisition of money from one firm or person was used in an attempt to secure a conviction for defrauding a second firm or person, from whom no money was directly received. Lord Campbell did in fact condemn the original underlying conduct of the defendant in this case, but he clearly distinguished it from conduct that was within the reach of the statute.

95. 1 Dears. C. C. 515, 169 Eng. Rep. 826 (Q. B. 1855).

96. *Id.* at 537-38, 169 Eng. Rep. at 835-36.

rights to honest government, there may be deception, but there is no transfer of anything of economic value[97] from the citizens to the politician. The meaning of fraud at the time the mail fraud statute was enacted and initially amended does not, therefore, support the intangible-rights theory.

III. Support for the Intangible-Rights Doctrine in Prior Federal Case Law

Although the legislative history of the statute and the contemporaneous understanding of "fraud" fail to support the intangible-rights doctrine, decisions of the Supreme Court and of several courts of appeals have been cited as support for the doctrine. These cases have, however, been misapplied when offered as authority for the doctrine.

A. Supreme Court Decisions

Although the Supreme Court has not dealt directly with the intangible-rights doctrine,[98] two Supreme Court decisions construing section 1341, *Durland* v. *United States*[99] and *Badder* v. *United States*,[100] and Supreme Court cases analyzing fraud in federal statutes other than section 1341, have been cited as support for the intangible-rights doctrine.[101]

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97. In Carey v. Piphus, 435 U. S. 247 (1978), the Supreme Court, in an action for damages under section 42 of Title 42, held that constitutionally guaranteed civil rights have no intrinsic economic value. *Id.* at 254-55.

98. The only section 1341 political-corruption case to reach the Supreme Court is Parr v. United States, 363 U. S. 370 (1960). The defendant in *Parr* was acquitted because of the prosecution's failure properly to demonstrate use of the mails, and the Court did not address the validity of the intangible-rights doctrine. *Id.* at 393-94.

99. 161 U. S. 306 (1896).

100. 240 U. S. 391 (1916).

101. *See* text and notes at notes *infra.*

1. Durland v. United States. As discussed above, the principal issue in *Durland* was whether the common-law defense of false promises might prevent a conviction under the mail fraud statute.[102] Under the majority rule at common law during the nineteenth century, a conviction for false pretenses could not be obtained on the basis of a false promise; a false representation had to refer to an existing or past fact to provide the basis for a conviction.[103] The Supreme Court held that this defense was not available in prosecutions under the mail fraud statute: "The statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud."[104]

The *Durland* Court's reference to the breadth of the statute has led some lower courts to interpret *Durland* as eliminating *all* common-law principles of fraud in connection with section 1341.[105] In so doing, these courts apparently disregard the fact

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102. *See* text and notes at notes *supra*. The defendant in *Durland* had devised a scheme to inveigle persons to "invest" in certain bonds which he promised would mature in extraordinarily short periods of time, producing very handsome profits for the putative "investors." The defendant's intention was to take all the money realized in the scheme for himself, paying nothing to the victims. Counsel for the defendant argued that his conviction for mail fraud could not stand, primarily on the ground that the defendant had made no representation as to existing fact but only a false promise about the future. 161 U. S. at 312-14.

103. *See, e.g.*, Commonwealth v. Drew, 36 Mass. (19 Pick) 179 (1837); Rex v. Goodhall, Russ & R. 461, 168 Eng. Rep. 898 (K. B. 1821); F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 543 (Philadelphia 1846).

104. 161 U. S. at 313.

105. *See, e.g.*, United States v. Mandel, 591 F. 2d at 1361; United States v. States, 488 F. 2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974). *But see* United States v. Rowe, 56 F. 2d 747, 749 (2d Cir.), *cert. denied*, 286 U. S. 554 (1932) (L.

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that *Durland* eliminated a single common-law defense. The Court did not hold that all common-law principles of fraud were inapplicable to section 1343.[106] Indeed, the Court was faced with no issue having a direct bearing on the intangible-rights doctrine.[107] Both after its ruling in the case and after the congressional codification of the ruling, the transfer of money or property was required in prosecutions under the statute.[108]

2. Badders v. United States. *Badders*[109] has been cited as support for a very broad reading of the statute in the political-corruption cases.[110] In *United States* v. *Mandel,* for example,

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Hand, J.) (*Durland* limited to removal of the false-promises defense only). In Parr v. United States, 363 U. S. 370 (1960), *discussed in* note 98 *supra,* Justice Frankfurter, in dissent, interpreted *Durland* as eliminating all common-law defenses. 363 U. S. at 400-01.

106. In United States v. McNeive, 536 F. 2d 1245, 1247 n. 3 (8th Cir. 1976), the Eighth Circuit considered *Durland* relevant to the intangible-rights theory because *Durland* recognized that the definition of fraud in the mail fraud statute was intended by Congress to be broader than the definition of fraud recognized at common law. Such reasoning, however, equates the removal of one common-law restriction with all common law restrictions.

107. The Court did decide a subsidiary issue involving the mailing requirement. 161 U. S. at 314-15. In the course of resolving this issue, the Court stated in dictum that "[i]t is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor." *Id.* at 315. The reference of the court here was to the fact that the defendant's actions involved an attempted fraud. *Id.* at 309, 310. Despite its lack of success, there is no doubt that the fraudulent scheme of the case involved the obtaining of money.

108. *See* text and notes at notes *supra.*

109. Badders v. United States, 240 U. S. 391 (1916).

110. *E.g.,* United States v. Mandel, 591 F. 2d at 1360; United States v. States, 488 F. 2d 761, 767 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

the Fourth Circuit quoted *Badders* dictum to support the proposition that section 1341 prohibits all forms of deception contrary to "accepted moral standards and notions of honesty and fair play."[111] Although the Supreme Court stated that section 1341's jurisdiction over misconduct accomplished through the *mails* provided a basis for Congress to proscribe anything contrary to public policy, the Court in *Badders* did not hold that Congress had done so.[112] The issue in that case was the constitutional question whether congressional power to regulate the mails necessarily included the power to punish certain conduct as criminal. The Court did not construe the concept of fraud in section 1341 broadly; rather, it construed broadly the constitutional power of Congress. Properly understood, the *Badders* dictum provides no support for the intangible-rights doctrine.

3. *Supreme Court Interpretations of Fraud in Other Federal Statutes.* The other Supreme Court cases cited by the lower federal courts as support for the intangible-rights doctrine concern the meaning of fraud in various federal statutes. In intangible-rights cases under section 1341, the issue is whether a conviction is possible without the transfer of valuable property. In the cited cases, however, there had either been such a transfer or the conviction was not sustained.

The court in *United States* v. *Isaacs* cited Supreme Court cases decided under two other federal statutes to support the intangible-rights doctrine. *United States* v. *Barnow*[113] involved a prosecution under a statute making it a federal crime falsely to "assume or pretend to be an officer or employee . . . of the United States . . . [and] in such pretended character demand or obtain from any person . . . any money, paper, document, or other valuable thing," with intent to defraud.[114] The victims

111. 591 F. 2d at 1360.

112. Badders v. United States, 240 U. S. 391, 393 (1916).

113. 239 U. S. 74 (1915).

114. Act of Mar. 4, 1909, ch. 321, § 32, 35 Stat. 1088 (current version at 18 U. S. C. § 912 (1976)).

had transferred money to the defendant, but sustained no economic loss.[115] The Court ruled that economic loss was unnecessary for conviction. This case—like *LaMoyne*[116] and *Bryant*[117] —is, however, only another illustration of the common-law principle that the victim need not suffer economic loss provided that the defendant has received something of economic value from the victim.

The Seventh Circuit, in *Isaacs,* cited two other Supreme Court cases as support for the intangible-rights theory: *Hass* v. *Henkel,*[118] and *Hammerschmidt* v. *United States.*[119] Each of these cases was decided under a predecessor to section 371 of Title 18, which proscribes any conspiracy "to defraud the United States . . . in any manner or for any purpose."[120]

In *Haas,* the Court upheld an indictment charging the prisoner, who was seeking habeus corpus relief, with defrauding the government.[121] The Court noted that the statute reached conspiracies "to defraud the United States by depriving it of its lawful right . . . or promulgating or diffusing . . . information . . . officially acquired."[122] The Court added, however, that "it is not essential to charge or prove an actual financial or property loss to make a case under the statute."[123] The statement is merely a repetition of the common-law rule that pecuni-

115. 239 U. S. at 75.

116. *See* text and notes at notes 82-85 *supra.*

117. *See* text and notes at notes 86-89 *supra.*

118. 216 U. S. 462 (1910).

119. 265 U. S. 182 (1924.

120. Rev. Stat. § 5440 (1878) (current version at 18 U. S. C. § 371 (1976)). Since the crime was defined to include conspiracy, inchoate fraud could be punished under this provision.

121. 216 U. S. 462, 479-80 (1910).

122. *Id.*

123. *Id.* at 480.

ary loss by the victim is unnecessary provided that the requirements of fraud have been met.[124]

The *Isaacs* court relied on the Supreme Court decision of *Hammerschmidt* v. *United States* by quoting the following passage: "It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention."[125] The Seventh Circuit did not explain how this statement supports the intangible-rights doctrine.[126] The first clause of the quoted sentence merely repeats the common-law principles that the victim of a fraud need not suffer economic loss.

The second clause of the quoted statement arguably supports the intangible-rights doctrine. The Court perhaps used the words, "but only that its legitimate official action and purpose shall be defeated by," to indicate that a transfer of something of economic value is unnecessary whenever the interference with official government action has resulted in a deprivation of rights. Such an argument is, however, untenable. There are two elements to fraud: deception, and the transfer of an item of eco-

124. The cases the *Haas* Court cited also provide no support for the intangible-right doctrine. Both cases were decided under the predecessor to Section 371 of Title 18. Hyde v. Shine, 199 U. S. 62 (1905), dealt with a purported scheme to defraud the government in a transaction concerning public lands. This case, like *Haas,* held that the victim of a fraudulent scheme need sustain no economic loss. *Id.* at 81-82. It is, moreover, clear that the defendants in *Hyde* received something of value—public lands. *Id.* at 83. United States v. Keitel, 211 U. S. 370 (1908) involved a scheme to defraud the government of title to certain coal lands. Again the Court found the lack-of-economic-loss argument to be unpersuasive, and ruled against the defendant. *Id.* at 393-94.

125. United States v. Isaacs, 493 F. 2d 1124, 1150 (7th Cir. 1974), *cert. denied,* 417 U. S. 976 (1974).

126. *Id.*

nomic value.[127] The question before the Court, noted Chief Justice Taft, was "whether deceit or trickery was essential to satisfy the defrauding required under the statute,"[128] and it was to that question that the quoted statement was undoubtedly addressed. Indeed, the concluding words of the second clause specify that the statute required only that official action be defeated by "misrepresentation, chicane or overreaching"—language plainly discussing the deception requirement.[129]

Thus, the Supreme Court cases cited by the Seventh Circuit in *Isaacs* either fail to support or undercut the intangible-rights doctrine. Other courts, however, have attempted to support the doctrine with Supreme Court precedent. In *United States* v. *States*,[130] for instance, the federal district court cited two Supreme Court decisions for the proposition that the intangible rights of citizens to representative government have economic value and that "[u]nder our form of government . . . it could

127. 2 J. STEPHEN, *supra* note 68, at 121-22; Fridman, *supra* note 68, at 537-38.

128. Hammerschmidt v. United States, 265 U. S. 182, 187 (1924).

129. *See id.* at 185-87.

The *Hammerschmidt* Court cited several of its prior decisions in the opinion, and—like *Hammerschmidt* itself—none of these cases provide support for the intangible-rights theory. *See* United States v. Barnow, 239 U. S. 74 (1915); United States v. Foster, 233 U. S. 515 (1914); United States v. Plyler, 222 U. S. 15 (1911); Haas v. Henkel, 216 U. S. 462 (1910), *discussed in* text and notes at notes 129-132 *supra*. In *Foster*, brought under the Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096 (current version at 18 U. S. C. § 371 (1976)), the Court found that although the government might well have suffered no economic loss in the fraudulent transaction, there were grounds for charging the defendant with criminal conduct. 233 U. S. at 525-26. The defendant postmaster meant to obtain a thing of value through his conspiratorial action: an increase in his salary. *Id.* at 519-20.

130. 362 F. Supp. 1293, *aff'd*, 488 F. 2d 761 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).

hardly be contended that the right to have one's vote counted, undiluted by fraudulent absentee ballots, is without value."[131]

The *States* court relied on *United States* v. *Saylor*[132] and *United States* v. *Classic*.[133] Both cases involved federal prosecutions for interference with the conduct of elections, and were brought under a Reconstruction Era civil rights statute making it a criminal offense for "two or more persons [to] conspire to injure . . . any citizen in the free exercise or enjoyment of any right . . . secured to him by the Constitution or laws of the United States."[134] The issue in both cases was whether the statute could be construed to prohibit certain specific kinds of election irregularities, in a context in which citizens' voting rights were acknowledged to be constitutionally protected.[135] The cases do not support the proposition that intangible civil rights have economic value[136]—a proposition of dubious validity today[137] and undoubtedly beyond the intentions of Congress in 1872, when the mail fraud statute was first enacted. The

131. *Id.* at 1296.

132. 322 U. S. 385 (1944).

133. 313 U. S. 299 (1941).

134. 18 U. S. C. § 241 (1976). *Classic* also involved the predecessor to 18 U. S. C. § 242 (1976). The district court decision in United States v. Classic, 35 F. Supp. 457 (E. D. La. 1940), did contain a ruling that the defendants might be prosecuted under the mail fraud statute for their role in voting irregularities, but this issue was not preserved for decision by the Supreme Court.

135. United States v. Classic, 313 U. S. 299, 307-29 (1941); United States v. Saylor, 322 U. S. 385, 387-88 (1944). Justice Douglas, dissenting in *Saylor,* focused especially on the issue of federalism. *Id.* at 390-393 (Douglas, J., dissenting).

136. *Cf.* United States v. Gradwell, 243 U. S. 476, 481, 485 (1917) (a conspiracy to bribe electors does not constitute a fraud upon the United States) (decided under Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096 (current version at 18 U. S. C. § 371 (1976))).

137. *See* text and note at note 97 *supra.*

presentation of Supreme Court authority by the lower courts has been inapposite because these courts have ignored the explicit requirements for a finding of fraud. The central requirement—the transfer of something of economic value—has not been discarded by prior Supreme Court decisions.

B. Decisions of the Lower Federal Courts

The courts that have adopted the intangible-rights doctrine have relied[138] on the earlier decisions of two lower courts: *Shushan* v. *United States,*[139] decided by the Fifth Circuit in 1941, and *United States* v. *Procter & Gamble Co.,*[140] decided by a district court in 1942. Careful analysis of these cases reveals, however, that although the defendants were charged with participation in schemes involving the breach of certain rights and duties, they also derived direct financial benefit from the victims of their frauds. These cases do not provide authority for the intagible-rights theory, under which there is no requirement that the defendant receive something of economic value from the victims of the fraud.[141]

In *Shushan,* the codefendants sought to obtain by fraud money from the parish fisc. Abraham Shushan, who had previously served on the Orleans Parish Levee Board,[142] conspired with a current Board member and three others in a scheme by which they obtained money deceptively from the Board through a plan to refund outstanding issues of its bonds. The defendants

138. *See, e.g.,* United States v. Mandel, 591 F. 2d at 1362; United States v. Isaacs, 493 F. 2d 1124, 1149-50 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974); United States v. States, 488 F. 2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974).

139. 117 F. 2d 110 (5th Cir. 1941), *cert. denied,* 313 U. S. 574 (1942).

140. 47 F. Supp. 676 (D. Mass. 1942).

141. *See* text and notes at notes *supra.*

142. He had been appointed by the late Governor and U. S. Senator Huey Long. T. H. WILLIAMS, HUEY LONG 421 (1969).

charged an exorbitant fee for the refunding service subsequently rendered; the fee was divided among the defendants according to a prearranged formula.[143] The Fifth Circuit noted that "all [of the defendants' conduct] was done and intended to obtain sums of money from the Board and taxpayers to be converted to [the defendants' own] use."[144] This aspect of *Shushan* plainly provides no support for the intangible-rights doctrine.

Another part of the *Shushan* opinion—concerned with demonstrating the requisite element of deception—has, however, been cited as support for the intangible-rights doctrine. To strengthen its contention that the convictions did not rest solely on false representations or lies about the nature of the funding scheme, the court invoked a theory of fraud predicated on the breach of fiduciary duty.[145] The one defendant sitting on the Board was bribed by the other defendants to persuade the Board to agree to the refunding scheme. The defendant Board member did so without revealing his own private interest in the matter. These actions by all the defendants resulted in a breach of their fiduciary duty to the Board and to the public. As the court stated, "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one [*sic*] must in the federal law be considered a scheme to defraud."[146] Separating the words from their context, the statement might seem to support the intangible-rights doctrine; accordingly, some courts have cited *Shushan* in support of the doctrine.[147] The context, however, demonstrates that

143. 117 F. 2d at 114-15.

144. *Id.* at 115.

145. *Id.*

146. *Id.*

147. *See, e.g.*, United States v. States, 488 F. 2d 761, 767 (8th Cir. 1973) ("In *Shushan* there is the implication that a scheme to gain personal favors from public officials is a scheme to defraud the public, although the interest lost by the public can be described no

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the court was not addressing the question whether the defendants gained in the scheme; the court had already concluded that the economic requirement had been met.[148] Rather, the court was establishing the proposition that breach of fiduciary duty is a kind of deception, and that when such a breach accounts for the acquisition of money—as it did here—the defendants have committed fraud.

United States v. *Procter & Gamble Co.*[149] involved a prosecution under section 1341 in a nonpolitical setting. The corporate defendant had bribed employees of a competitor to obtain certain trade secrets of the competitor. The court explicitly rejected the defendant's contention that the proprietary information it illicitly obtained lacked monetary value.[150] Like the Fifth Circuit in *Shushan,* the court went on to consider whether the defendant had used deception, and, as in *Shushan,* the court's theory involved breach of fiduciary duty: "When one tampers with that relationship [between employer and employee] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right."[151] Although *Procter* has been cited as support for the intangible rights doctrine by many of the recent political-corruption cases[152] and by

(Footnote continued from preceding page.)
more concretely than an intangible right to the proper and honest administration of government."), *cert. denied,* 417 U. S. 909 (1974). *Accord,* United States v. Keane, 522 F. 2d 534, 546 (7th Cir. 1975); United States v. Isaacs, 493 F. 2d 1124, 1150 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974).

148. Only a few lines earlier, the court noted that "[a] scheme to get *money* unfairly by obtaining and then betraying the confidence of another . . . would be a scheme to defraud though no lies were told." 117 F. 2d at (emphasis added).

149. 47 F. Supp. 676 (D. Mass. 1942).

150. *Id.* at 679.

151. *Id.* at 678.

152. *See, e.g.,* United States v. States, 488 F. 2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U. S. 909 (1974); United States v.

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two recent Seventh Circuit cases adopting the doctrine in a corporate context,[153] the *Procter & Gamble* court did not embrace any theory of intangible rights. Rather, the court held that something of economic value—proprietary information—had been taken from the defendant.

Procter & Gamble and *Shushan* establish no more than that under some circumstances a breach of fiduciary duty amounts to the deception necessary for fraud. These early cases, to which the origin of the intangible-rights theory seems to have been traced by later courts, actually left the economic requirement of fraud intact.

(Footnote continued from preceding page.)
Mandel, 415 F. Supp. 997, 1012 (D. Md. 1976), *rev'd on other grounds,* 591 F. 2d 1347 (4th Cir.), *aff'd in relevant part* en banc, 602 F. 2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 48 U. S. L. W. 3662 (U. S. Apr. 14, 1980) (Nos. 79-1029, 79-1030).

153. United States v. Bryza, 522 F. 2d 414 (7th Cir. 1975); United States v. George, 477 F. 2d 508 (7th Cir.), *cert. denied,* 414 U. S. 827 (1974). Both *George* and *Bryza* involved schemes in which a corporate purchasing agent received payments in connection with secret agreements with his employer's suppliers. The facts in each case do not clearly indicate whether there was a direct causal relationship between the defendant's receipt of the payments and his deception of the corporate victim—that is, whether the defendant received payment directly from corporate funds. The *George* court found this issue of causation irrelevant to its holding, *id.* at 512. Both courts, however, based their affirmation of the convictions squarely upon the intangible-rights doctrine, which was characterized as the deprivation from an employer of its employee's "loyal and honest services." *Id. See Bryza,* 522 F. 2d at 422. Possibly the best interpretation of *George* and *Bryza* is that the Seventh Circuit simply used the intangible-rights doctrine to avoid the difficult problem of establishing, from complex and ambiguous facts, that the defendants had received direct economic benefit from the corporate victims of their deceptive schemes. To the extent that the court bottomed such an approach on *Procter & Gamble,* it was without genuine authority for its holdings.

Conclusion

By invoking a theory of intangible political rights, several federal courts have attempted to convert the federal mail fraud statute—section 1341—into a weapon for fighting political corruption when the citizenry has not been deprived of anything of economic value. The mere deprivation of the right to honest government, according to the intangible-rights theory, constitutes fraud for purposes of section 1341.

Analysis of the legislative history of section 1341, however, demonstrates that the section's reach should be limited to fraudulent conduct that results in the acquisition of money or property from the victim. The meaning of fraud in the nineteenth century, when the mail fraud statute was originally adopted, provides further support for such a reading. Moreover, the Supreme Court and lower federal court decisions that have been cited for an intangible-rights construction of section 1341 do not provide support. The use of section 1341 against politically corrupt politicians thus remains contrary to Congress's original intent. Until Congress amends section 1341, the continued use of the section to prosecute corrupt politicians on a theory of intangible political rights should not be permitted by the courts.

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